U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 25 January 2005

CASE NO.: 2004-LHC-695

OWCP NO.: 07-158322

IN THE MATTER OF:

BOBBY D. PERRY,

Claimaint

v.

HELMERICH AND PAYNE,

Employer

and

NATIONAL UNION FIRE INSURANCE COMPANY OF LOUISIANA,

Carrier

APPEARANCES:

Tommy Dulin, Esq.,

on behalf of Claimant

Laurie Briggs Young, Esq.,

on behalf of Employer/Carrier

Before: Lee J. Romero, Jr.
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, et. seq., brought by Bobby D. Perry (Claimaint) against Helmerich and

Payne (Employer) and National Union Fire Insurance Company of Louisiana (Carrier). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held on August 11, 2004, in Gulfport, Mississippi.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified and introduced twenty (20) exhibits which were admitted, including: various Department of Labor filings; medical records from Jackson Memorial Hospital, Mississippi Health Services, Dr. Jeffrey Laseter, Dr. Kendall Blake, Dr. J. Patrick Barrett, Dr. Robert W. Davis; medical bills from Baptist Memorial Hospital and Tyler Holmes Memorial Hospital; Claimant's wage records and personnel file; and Employer's Policy Handbook.[1] Employer introduced ten (10) exhibits, which were admitted, including: vocational records of Barney Hegwood and Nancy Favaloro; Claimant's deposition and pharmacy records; deposition of Dr. Barrett; and Claimant's psychological evaluation. The parties entered into written factual stipulations which were received as Joint Exhibit No. 1 (JX-1).

Post-hearing briefs were filed by the parties.[2] The record was left open for 45 days following the hearing to allow for the deposition of Dr. Barrett as well as a psychological evaluation of Claimant, in accordance with Dr. Barrett's recommendation. Based upon the stipulations of the parties, the evidence introduced, my observation of the witness demeanor and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1) and I find:

1. Claimant sustained an injury on September 3, 2000;

2. Claimant's injury was in the course and scope of his employment;

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[1] References to the transcript and exhibits are as follows: Trial transcript- Tr.__; Claimant's exhibits- CX-__, p.__; Employer exhibits- EX-__, p__; Joint Exhibits- JX-__, p.__.

[2] Claimant submitted a 31-page brief on October 25, 2004. Employer submitted a 20-page brief on October 25, 2004.

3. An employer-employee relationship existed at the time of Claimant's injury;

4. Employer was advised of the injuries on September 3, 2000;

5. Employer filed Notices of Controversion on November 17, 2003, and January 17, 2003;

6. An informal conference with the District Director was held on June 3, 2003;

7. Employer paid temporary total disability benefits at the rate of $497.64 per week from September 28, 2000 through October 30, 2003, and permanent partial disability benefits at the rate of $248.89 per week from October 30, 2003 through the present and continuing, for a total of $93,069.83;

8. Employer has paid medical benefits in the amount of $59,045.27.

II. ISSUES

The following issues were presented by the parties for resolution:

1. Nature and extent of Claimant's disability;

2. Claimant's average weekly wage at the time of injury;

3. Existence of suitable alternative employment;

4. Psychiatric care authorization;

5. Attorney's fees, penalties and interest.

III. STATEMENT OF THE CASE

Testimonial Evidence

Claimant

Claimant is 50 years old and lives with his wife and one adult son in Weir, Mississippi, approximately 100 miles north of Jackson, Mississippi. Claimant did not finish high school,

instead working in an automobile shop with his grandfather before taking a job at S&S International Truck. (Tr. 26-28, 57, 69). In 1980, while working at S&S, Claimant suffered severe burns for which he filed a workers' compensation claim and received $10,000 in settlement money. After he recovered from the burns, Claimant received a 2-year degree from junior college and attended Mississippi State University, though he did not receive a degree from Mississippi State. (Tr. 28-29). Claimant also performed odd jobs, mostly in body work and painting and also kept house while his wife worked. During this time he was never evaluated for psychological treatment, even though he was unable to work a steady job. (Tr. 29, 60-61, 82).

In 1999 Claimant applied for a roustabout position at Employer after hearing about the opening by word of mouth. He passed the pre-employment physical and drug tests without incident and was hired at Employer's Pearl, Mississippi branch office in July 1999. (Tr. 29-30, 32). Claimant was assigned to work on MARS, a Shell rig in the Gulf of Mexico. He flew out of Venice, Louisiana, and worked 14-day hitches for 12-12.5 hours per day, plus overtime. Claimant testified he earned $11.60 per hour and never had any problems with his employment. (Tr. 30-33).

Claimant's job as roustabout included loading pipe, unloading boats, mopping, sweeping, painting, and whatever else was necessary. He climbed "all the time" and regularly lifted items such as shackles, pipes and tools which weighed 100 pounds and more. (Tr. 30-31). In September 2000, he was temporarily transferred to URSER, another Shell rig, where he was injured on September 3, 2000. (Tr. 33-34). Claimant was lifting bolsters, which weigh 125-150 pounds apiece, with another roustabout when he experienced extreme pain in his lower back. Upon his co-worker's advice, Claimant went to the medic, who gave him aspirin and told him to lie down, which did not ease Claimant's pain. He informed his supervisors of his injury and tried to work through the pain, but it was too severe. (Tr. 34-36). The next day Claimant was flown to the company doctor in Hammond, Louisiana who gave him a steroid shot in his back and diagnosed him with a pulled muscle. Claimant testified the shot provided instantaneous relief from his back pain. (Tr. 36-37).

Claimant returned to MARS, where his supervisor, Kenny Lofton, instructed him to take inventory in the paint room and not do any lifting. After three hours of this light duty, Claimant's pain became severe and he would lay down for almost two days before the rig manager sent him back to the doctor.

Claimant testified the company's doctor wanted him to do squatting and lifting, but he was unable. Claimant finished his hitch at the yard in Pearl, Mississippi, before returning home. (Tr. 37-38).

Claimant went to see Dr. David Luke, a general physician near his hometown, who referred him to an orthopedic surgeon in Tupelo, Mississippi. At the request of Mr. Benfield, Employer's claims adjuster, Claimant went to see orthopedic surgeon Dr. Barrett; he canceled his appointment in Tupelo. (Tr. 39-40). Dr. Barrett informed Claimant his bone had slipped and was putting pressure on the nerves going down his leg. Claimant testified that both of his legs were numb, and the side of his right foot was numb; he also experienced severe tingling and pain. Claimant did not want to undergo surgery, but as he also did not want to take pain killers indefinitely, he agreed to a spinal cord fusion, front and back, which Dr. Barrett indicated was most likely to permanently relieve his pain. (Tr. 42-43). This procedure involved two surgeries within the same week, wherein Dr. Barrett inserted a piece of steel into his back and secured it with eight screws. Claimant testified he was up and walking the day following the second surgery. He was self-sufficient and could walk around without difficulty; he attempted to walk one mile per day.[3] (Tr. 43-44, 74).

Since his surgery, Claimant developed scar tissue over the site of the surgery, and he continued to have problems with his back. He testified his condition was worse now than it was six months after the operation. Specifically, Claimant experienced extreme pain with sitting for any period of time. (Tr. 44-45). Dr. Barrett referred Claimant to pain management specialist, Dr. Laseter. Claimant treated with Dr. Laseter in April and June 2003 and has had one follow-up visit since then. The doctor identified the scar tissue as the source of Claimant's continued pain and gave him a steroid shot for the pain. This shot provided some relief, but a second shot was much more beneficial for his pain. Claimant testified he may have over-exerted himself after the second shot, as the severe pain returned. (Tr. 45-47, 57).

In June 2004, Claimant told Dr. Barrett his condition was the same, although still much better than before the surgery. Dr. Barrett advised Claimant to seek psychiatric counseling,

[3] Claimant testified he had a Functional Capacity Evaluation scheduled in December 2002, but he could not perform it due to his high blood pressure. It was never rescheduled. (Tr. 84).

although he did not recommend a particular psychiatrist or psychologist. However, Dr. Barrett's secretary informed Claimant the treatment was not authorized and would not be paid for. On cross-examination, Claimant testified he did not ask Dr. Barrett for psychological care. (Tr. 49, 61-62). Claimant acknowledged Dr. Barrett's notes indicated he had emotional problems and was separated from his wife. On cross-examination, he agreed with his doctor's opinion that the basis for his emotional problems was his marriage problems; specifically he testified he could pretty much deal with his pain, although he was also depressed because of his inability to work. (Tr. 63-64). Claimant testified he was willing to see a psychiatrist, and was waiting on referrals from Dr. Barrett. He acknowledged his pain and inability to work negatively affected his depression. (Tr. 87).

Claimant took two Somas before the hearing. He has also been prescribed Darvocet and Lorcet. The Lorcet made Claimant dizzy, sleepy and disoriented, but he has not taken it in a while. Instead, he is taking the Darvocet which does not affect him as bad. (Tr. 52). He testified he has no other health problems other than his back, and is not taking any other medications aside from those prescribed by Dr. Barrett and Dr. Laseter. (Tr. 55).

Claimant testified he has not been too active lately to prevent his pain from returning. He does not walk or lift much and has discontinued his daily walks. Claimant stated he can bend to put his clothes and shoes on, but does not walk or lift much. He can climb one or two rungs of a ladder, but approximately seven months before the hearing he fell while stepping out of his trailer onto his deck. He does not do any strengthening exercises. Claimant testified he varies his activities between lying down and sitting, depending on how he feels. Some days he can perform light household chores, but other day he stays in bed. He has been able to get around town to do some shopping. His hobbies include the "rock pile" in his driveway and some limited fishing; generally, though, he has lost interest in hunting and fishing. Claimant testified he does not go to the movies, visit friends, or attend church anymore. (Tr. 50-52, 74-77).

Claimant also testified he has problems with driving long distances, as his back starts to hurt and his legs go numb. His wife drove him to the hearing. (Tr. 56). However, on cross-examination Claimant testified he possesses a valid Mississippi driver's license without restrictions, and has driven himself a

distance of 100 miles, to his appointments with Dr. Barrett. In his meeting with Mr. Hegwood, Claimant informed him he could drive about thirty minutes before having to rest and walk around a bit. Sitting for long hours bothers him; indeed, at the hearing he stood up after 45 minutes of testimony. (Tr. 68-69).

Claimant testified on cross-examination that Dr. Barrett had release him to work in 2001 or 2002, based on Claimant's missed appointments. However, at the time he was unaware of Dr. Barrett's opinion he could return to work until he received a letter from Mr. Benfield. (Tr. 60, 65). Claimant has not attempted to return to work since the September 3, 2000 accident. He testified Dr. Barrett never personally told him he could return to work. Specifically, he did not talk to Dr. Barrett about his workers' compensation claim or going back to sedentary work while settling the claim. Claimant was aware Dr. Barrett agreed with the report of Dr. Blake, but he did not know the content of the report. (Tr. 66-67).

Claimant testified his job at Employer was heavy duty work, which he is presently incapable of performing. (Tr. 62). He also testified he was willing to participate in a DOL vocational training program once he felt capable of working. However, due to his depression and pain Claimant testified he did not feel up to working; even if his doctor released him he would not be capable of holding a steady job. (Tr. 77-78). In the four years since his surgery, Claimant indicated he was probably most capable of working about one year after the surgery. (Tr. 78).

Claimant recalled meeting with Mr. Hegwood at his mother's house. He testified he was on medication during this meeting. When Mr. Hegwood asked if Claimant was represented by an attorney, Claimant replied "no." Claimant testified he actually had an attorney, but was unaware of it at the time. He remembered meeting with Mr. Dulin, but was not aware Mr. Dulin agreed to represent him. Some time after his meeting with Mr. Hegwood, Claimant's wife told him he had an attorney. Claimant called Mr. Benfield, who he met with a number of times, to inform him he was represented by an attorney. (Tr. 52-54). However, Claimant later testified he did not recall making Mr. Benfield aware he had an attorney. Claimant also did not remember meeting with Ms. Favaloro. (Tr. 55, 81).

Claimant testified all of his medical bills have been paid for by Employer, except his last visit to Dr. Laseter for pain management. (Tr. 50, 71). He recently encouraged his wife to quit her job as a school teacher, as it was low-paying and

stressful on her and their relationship. He testified he did not know of a reason why she could not return to work. Claimant's inability to work and his wife's unemployment had a bearing on his filing for bankruptcy approximately one year before the hearing. (Tr. 72, 85-87). Claimant received Social Security Disability (SSD) benefits following his 1980 burn injury, but his claim was subsequently denied and he is currently paying the money back. Claimant also has a note on his house, although his two vehicles are paid for. He testified he plans on applying for SSD benefits again. (Tr. 55, 70, 73).

Patrick Benfield

Mr. Benfield is the insurance adjuster assigned to handle Claimant's claim for workers' compensation benefits. To execute his duties, Mr. Benfield had numerous conversations with Claimant and his treating physicians. During these conversations, Claimant directly denied he had an attorney on the number of occasions Mr. Benfield inquired as to his representation. He testified he felt Claimant understood what was going on with his claim. (Tr. 90-91, 94-95, 110). Indeed, he spoke directly with Claimant until March 22, 2002, when he learned Claimant was represented by counsel by way of a letter of representation he received from the Department of Labor attaching with it the LS-203. He testified at the hearing that although the letter was dated November 29, 2001, it was not addressed properly and thus he did not receive it until almost four months later.[4] When he did receive the November letter, Mr. Benfield notified the Department of Labor and ceased communications with Claimant. He testified he regularly deals with attorneys, including Mr. Dulin, in his line of work and did not hesitate to do so in this case. (Tr. 92, 96-97, 109).

On cross-examination, Mr. Benfield testified he did not see the June 26, 2001 letter of representation Claimant's counsel filed with the Department of Labor. Similarly, while Mr. Hegwood was informed on March 11, 2002 that Claimant had an attorney, Mr. Benfield was not made aware of representation until a few days later, on March 13, 2002. (Tr. 115-16).

In the course of administering this claim Mr. Benfield also talked with Dr. Barrett and his staff, and received various

[4] The letter showed service was made on Carrier on November 29, 2001, although Mr. Benfield did not receive it until March 22, 2002. Moreover, the LS-202 was filed on November 19, 2001, but improperly addressed to "Helmerich and Payne" without an actual street address. (Tr. 116-18).

reports from the doctor. Dr. Barrett informed Mr. Benfield that the dual front and back fusions were a fairly new procedure, but that he has had success in returning patients to work in offshore employment and thought there was a good chance Claimant would also be able to return to work following the surgery. Based on this information, Mr. Benfield approved the procedure. (Tr. 97-98). Mr. Benfield clarified he was not responsible for paying the medical bills, but forwarded them to the administrator in San Antonio. As of the hearing, he was not aware of any unpaid bills. (Tr. 99).

In his July 17, 2001 report, Dr. Barrett indicated Claimant should be able to return to some form of work within approximately three months. Even though Mr. Benfield did not believe this prognosis, he arranged for vocational rehabilitation services from Mr. Hegwood in the fall of 2001. (Tr. 100-01). Mr. Hegwood met with Claimant and seven months later compiled a Labor Market Survey, in April 2002, at Mr. Benfield's request. Mr. Benfield testified he authorized the survey because it was one year after the surgery and he was getting the sense from Dr. Barrett that Claimant could perform some work. Mr. Benfield wanted to identify what, if any, occupations were available to Claimant. (Tr. 101).

He also testified Dr. Barrett recommended a functional capacity evaluation for Claimant. This was not Mr. Benfield's suggestion. He was aware, however, that Claimant could not perform the evaluation secondary to his high blood pressure. Dr. Barrett did not suggest rescheduling the FCE. (Tr. 119-20). Mr. Benfield also noted Dr. Barrett suggested additional surgery, including a decompression and extension of Claimant's original fusion. (Tr. 120).

Mr. Benfield authorized a second labor market survey in December 2002. On December 19, 2002, Dr. Barrett released Claimant to work at light duty, with no lifting more than 30 pounds and standing/sitting one hour at a time, with 5 minutes rest. Dr. Barrett opined Claimant would be able to work eight hour days under these restrictions. (Tr. 102-03). Based on this report and the labor market survey, Employer reduced Claimant's benefits to permanent partial disability benefits as of January 16, 2003. However, Dr. Barrett subsequently retracted his assessment of Claimant's ability to return to work, before releasing him to work a second time and then again retracting that release. (Tr. 103).

To resolve some of the confusion of whether Claimant could perform work, Mr. Benfield arranged for a medical evaluation by Dr. Blake. Dr. Blake opined Claimant could return to work at least at the sedentary level. Mr. Benfield recalled seeing Dr. Barrett's comments on Dr. Blake's report; in particular, Dr. Barrett "certainly agree[d]" with rating Claimant at sedentary activity. (Tr. 104-05). As such, Mr. Benfield arranged for yet another labor market survey, this time to be performed by Ms. Favaloro. Sedentary jobs were found for Claimant. Employer had paid retroactive reinstatement of temporary total disability from the period between January 16, 2003 and October 30, 2003, but paid only permanent partial disability benefits from October 31, 2003, based on Ms. Favaloro's labor market survey. (Tr. 105-07). He also testified, on cross-examination, that he relied on Mr. Hegwood's opinions for suitable alternative employment even though the jobs identified, including a teaching and coaching position, required certifications Claimant did not possess. (Tr. 113).

Mr. Benfield testified he computed Claimant's average weekly wage by adding up the total amount he earned between September 11, 1999 through September 9, 2000, which resulted in approximately $38,000, and divided that by 52 weeks to arrive at an average weekly wage of $746.54. (Tr. 107-08). Although Claimant was last paid for the pay period ending September 30, 2000, three weeks following his injury, Mr. Benfield only used the pay records from the 52 weeks immediately preceding Claimant's injury in his calculations. (Tr. 114).

Mr. Benfield testified he authorized Claimant to seek psychological treatment in July 2004. He faxed the authorization to Dr. Barrett and copied Employer's counsel. About one week earlier, Mr. Benfield informed Claimant's counsel that approval would not be a problem, but he had to receive authorization from the Employer. He testified he did not know whether Employer's counsel received the fax. (Tr. 112-13, 120-23).

Barney C. Hegwood, CRC, LRC

Mr. Hegwood is a licensed professional counselor in the States of Louisiana and Mississippi, and is also a licensed rehabilitation counselor in Louisiana. He also holds national certifications as a certified counselor and certified rehabilitation counselor. The parties stipulated to his qualifications as an expert in the field of vocational rehabilitation, and the court accepted him as such. Mr. Hegwood

was hired by Employer to perform a vocational analysis of Claimant; he subsequently compiled two different labor market surveys. (Tr. 125-26, 144). He met with Claimant on November 16, 2001. At this meeting and in their conversations leading up to the meeting, Claimant never informed Mr. Hegwood he had an attorney when asked about the status of his representation. Mr. Hegwood contacted Claimant a second time in February 2002, as a follow-up after Claimant's January 31, 2002 appointment with Dr. Barrett, at which time Claimant informed him he had an attorney. He advised Claimant to have his attorney contact Mr. Benfield and then ceased communicating directly with Claimant. He testified he did not receive a letter of representation for Claimant until May 2, 2002. (Tr. 127-29).

Mr. Hegwood met with Claimant for two hours on the morning of November 16, 2001. He found Claimant to be cooperative and candid. Claimant provided Mr. Hegwood a work and education history consistent with his testimony at the hearing. Claimant specified his past work included jobs as air conditioning and refrigerator mechanic, body and fender repairman, metal finisher and spray painter. Mr. Hegwood reported these jobs were all skilled or semi-skilled. (See EX-1, pp. 12-14). Claimant informed him he took Soma every 12 hours and Darvocet as needed, but had not taken any medication that particular morning before their meeting. Mr. Hegwood testified Claimant did not appear disoriented, and seemed to understand the questions asked of him. (Tr. 133-34).

Mr. Hegwood determined no vocational testing was needed in this case, as Claimant comprehended what was going on, was articulate and had sufficient education and vocational training. He noted Claimant had an associate's degree in physical education/coaching and three semesters at Mississippi State University, and was amenable to returning to school. He determined Claimant was of average, and possibly above-average, intelligence, having achieved a 3.2 grade point average while at MSU. He explained it is not unusual to not perform vocational testing in instances where the client has advanced degrees. (Tr. 135-36).

Claimant described himself to Mr. Hegwood as being relatively self-sufficient, although he occasionally had trouble bending to put on his shoes. His daily activities included a mile-long walk, light cooking and laundry and regular visits with his mom. (Tr. 137-38). Claimant informed Mr. Hegwood he did not do any heavy lifting, and could stand and walk for 30-45 minutes, but had problems sitting longer than 30 minutes. Mr.

Hegwood testified Claimant also had problems driving, as after 30 minutes his leg would go numb. Mr. Hegwood noted Claimant rose twice during their 2.5 hour meeting, although he did not appear to be in distress. (Tr. 138). Mr. Hegwood stated that the meeting took place at Claimant's mother's house, as his house was being renovated; however, he was not aware that Claimant was personally involved in the renovations. (Tr. 137).

Mr. Hegwood testified he held off on performing the labor market survey until he received Claimant's physical restrictions from Dr. Barrett. On January 24, 2002 he wrote Dr. Barrett asking him to clarify his opinions on Claimant's MMI and ability to return to work, but Dr. Barrett did not reply. In response to Mr. Hegwood's follow-up fax dated February 26, 2002, Dr. Barrett refused to provide any information until after Claimant's re-evaluation scheduled for March 26, 2002. (Tr. 140-41). Mr. Hegwood issued his vocational analysis report of Claimant on March 11, 2002. He testified that back surgery patients normally reach MMI 12-18 months post-surgery, and are generally released to light-medium physical demand levels. (Tr. 141-42).

Mr. Hegwood received Dr. Barrett's April 4, 2002 report which indicated Claimant "could go back to light duty or even medium duty at this time," and used that as a basis for his labor market survey issued June 19, 2002. (CX-13, p. 23). Mr. Hegwood identified two jobs in the light to medium physical demand level which were located in Claimant's community. The jobs were a coach/physical education teacher at Grace Christian School, paying $8.00-$9.00 per hour, and a coach at Nexapater Elementary, paying $11.88 per hour. Mr. Hegwood testified the latter job required Claimant to have certification as a teacher in the state of Mississippi, but he could apply for temporary certification and then have 8-12 months to achieve full certification. Grace Christian School did not require certification. Mr. Hegwood contacted both employers, who were willing to consider an applicant with Claimant's background, education and restrictions. (Tr. 143-46, 159-60; EX-1, p. 19). Mr. Hegwood testified no accommodations would be necessary in these jobs, which he considered to be appropriate for Claimant. (Tr. 145, 147). Although he contacted fifty-five (55) employers in the area, many asked him to check back in one month when business picked up; these two positions were the only ones that were actually open, within Claimant's restrictions and expertise. Mr. Hegwood considered the two jobs to be competitive employment. (Tr. 156-57; EX-1, pp. 18-19).

Mr. Hegwood performed a second labor market survey on December 4, 2002, at the request of Mr. Benfield. In the absence of a report from Dr. Barrett, he assumed Claimant was capable of performing work in the light to medium physical demand level. He noted this survey was performed at about the same time Dr. Barrett requested the functional capacity evaluation. (Tr. 147; EX-1, p. 22). In December 2002, Mr. Hegwood found three jobs available to Claimant and within 35 miles of his home in Weir, MS. The Assistant Manager position at Sherwin-Williams Paint Store paid $24,000 to $32,000 per year and involved being in charge of inventory, ordering, accounts payable and receivable. Although it involved lifting up to 50 pounds maximum, Mr. Hegwood testified accommodations could be made to have another employee perform the lifting duties. (Tr. 148-49; EX-1, p. 23).

The second job was a supply salesman/cashier position at Breland Building, a local building supply company. This job involved frequent alternate sitting, standing and walking. Lifting was not a concern, as forklifts and co-workers were available to lift anything Claimant could not. (Tr. 150; EX-1, p. 23). Finally, Mr. Hegwood also identified a job as an automotive spray painter in Kosciusko, MS, through the Mississippi employment agency. This was a full-time position masking and painting vehicles, and paid $7.50 per hour. It was in the light physical demand level, with frequent standing, walking, sitting at breaks, occasional bending and lifting of no more than ten pounds. (Tr. 150, 160-62; EX-1, p. 23B).

Mr. Hegwood noted Dr. Barrett's report of December 19, 2002, released Claimant to light duty work with maximum lifting of 30 pounds. (CX-13, p. 17). All the jobs included in his two labor market surveys fit this restriction. However, Mr. Hegwood conceded he did not send any of the job descriptions to Dr. Barrett for his approval. He also did not compute what these jobs paid at the time of Claimant's injury. All of the jobs he found were of the type regularly available in rural Mississippi, and all employers were willing to consider Claimant's application after being advised of his background, education and restrictions. (Tr. 151-55; EX-1, pp. 24-25).

On cross-examination, Mr. Hegwood testified the Occupational Wage Report in his records was a listing of job categories appropriate and available to Claimant in or around Weir, Mississippi. The median hourly wages were from 2000, but he clarified these were not actual job openings. (Tr. 154, 162; EX-1, p. 15). Five jobs listed in the labor market survey were

encompassed in this report; if he considered jobs outside Claimant's transferable skills, there were even more positions available. However, he considered Claimant overeducated for these positions at which he would be under-employed. (Tr. 163).

Mr. Hegwood also acknowledged that none of the jobs listed in his labor market surveys are appropriate for Claimant under Dr. Blake's restriction of sedentary physical demand level. He has not been asked to conduct a job search based on Dr. Blake's opinion. (Tr. 158-59).

Nancy Favaloro, MS, CRC

Ms. Favaloro was accepted as an expert in the field of vocational rehabilitation. She performed a labor market survey in this case at the request of Mr. Benfield, using Claimant's background information provided by Mr. Hegwood. She did not personally interview Claimant. Ms. Favaloro testified she has worked with Mr. Hegwood in the past and did not hesitate to rely on his reports in this matter. Ms. Favaloro also testified she personally reviewed the medical records of Dr. Barrett, Dr. Blake and Dr. Laseter. (Tr. 165-67).

At the time of her labor market survey, Claimant was restricted to sedentary work activity with no standing, climbing, stopping, bending or lifting more than 20 pounds.[5] In her report, she focused on jobs with lifting less than 20 pounds and where Claimant could easily alternate between sitting and standing. Ms. Favaloro testified she did not consider the effects of Claimant's prescription medication, assuming those were included in the doctors' assessments. She was aware Claimant was incapable of performing his FCE, but she did not consider his hypertension in her job search. (Tr. 167, 176-77). She also looked for jobs within Claimant's set of transferable skills, noting he had an associate's degree in physical education and was familiar with a computer keyboard. She conducted her job search within a 35-mile radius of Weir, Mississippi. None of the jobs she located were sent to the doctors for their approval. (Tr. 168, 176).

[5] Ms. Favaloro noted that Dr. Barrett indicated Claimant was capable of sedentary work in his October 9, 2003 report and again in March 2004. (Tr. 179).

The first job Ms. Favaloro listed in her report was that of an assistant teacher and/or tutor.[6] The wages in the report were based on the teacher position alone, which paid $10,000-$11,000 per year, even though it was a 9-month position at 30 hours per week. This computed to an hourly rate of $6.78 over nine months. However, Ms. Favaloro testified this could be supplemented with 10 hours per week of tutoring, which paid $20 per hour. Both jobs would allow Claimant the opportunity to alternate between sitting, standing and walking. (Tr. 169-72; EX-2, p. 3).

Ms. Favaloro identified a dispatcher position at Mississippi State University in Starkville which allowed for alternate sitting, standing and walking; it paid $6.50 per hour. She also listed positions as a manager-trainee at Tower Loan Co. in Starkville ($8.00 per hour), production worker at MFJ Enterprises in Starkville ($6.50 per hour), security guard for Pro Security ($6.00 per hour) and an admissions clerk at Winston Medical Center in Louisville, MS, which paid $6.25 per hour. (Tr. 172-74; EX-2, pp. 3-4). All of the jobs were of the sedentary physical demand level and involved sitting with standing at will, as needed. Ms. Favaloro testified she provided each prospective employer with information as to Claimant's background, age and restrictions, and they were all willing to consider him as an applicant. (Tr. 174-75).

Based on her experience with conducting job searches in Mississippi, Ms. Favaloro testified these jobs represented jobs regularly available in Mississippi. (Tr. 175). While she did not travel to Weir in conducting the search, Ms. Favaloro testified either she or her assistant personally talked with each employer about the available positions. (Tr. 178). On cross-examination, Ms. Favaloro conceded Dr. Barrett's deposition and/or Claimant's psychological evaluation could change her opinion. She did not seek clarification from Dr. Blake as to his restrictions for Claimant. However, Ms. Favaloro conceded Dr. Blake recommended no lifting, and many of the jobs she found required minimal lifting of less than 10, sometimes less than 5, pounds. (Tr. 180-81).

[6] Ms. Favaloro testified there were three combinations of duty available at this employer: assistant teacher, tutor, or both. (Tr. 171-72).

Medical Evidence

Dr. J. Patrick Barrett

Dr. Barrett is an orthopedic surgeon at the Mississippi Spine Clinic who treated Claimant on twenty-five different occasions between October 16, 2000 and June 22, 2004, in connection with his September 3, 2000 injury. He testified by deposition on August 16, 2004. (EX-7, p. 1; CX-13). Claimant first presented to Dr. Barrett on October 16, 2000 with complaints of back and bilateral leg pain which was worse on the left. Claimant provided an account of his September 3, 2000 work incident consistent with his testimony at the hearing, supra. Dr. Barrett noted no other prior serious medical problems. (CX-13, p. 46). At this initial visit, a physical examination revealed Claimant had difficulty with ambulation and an MRI showed foraminal stenosis at L4-5 and L5-S1 with significant degenerative changes. This was corroborated by CTs and EMG nerve conduction studies performed on October 31, 2000. Dr. Barrett restricted Claimant from any work. (CX-13, pp. 45, 47; EX-7, pp. 3-4).

Dr. Barrett testified he discussed surgical options with Claimant in October 2000, including the posterior and anterior fusion which he thought would provide Claimant the best chance of returning to his job offshore. After pursuing a conservative course of treatment without improvement, Claimant agreed to the surgery which was performed over the course of two different days, April 2 and 5, 2001; he was discharged from the hospital on April 8, 2001. (CX-13, pp. 39-43). Dr. Barrett testified there was nothing remarkable about the timing of the surgery or the surgical procedure itself. He added that based on his past experience with this particular procedure he thought Claimant had a 50-50 chance of returning to Longshore work. (EX-7, pp. 5-6, 10).

In the months following the surgery, Claimant appeared to be recovering well. He was up and walking just 10 days following the surgery, and had increased his distance to two miles per day by the end of May 2001. Dr. Barrett testified he encourages patients to be as active as possible following this type of procedure, to help with overall health as well as circulation, bone compression and stimulation. (CX-13, p. 34; EX-7, pp. 10-13). On July 17, 2001, Dr. Barrett opined Claimant would be able to return to work at Employer within about three months time. (EX-7, p. 14). However, at a follow-up appointment on November 1, 2001, Dr. Barrett noted Claimant's

fusion was not healed completely and he was having pain and numbness after 2.5 hours of activity. Dr. Barrett did not release Claimant to work. (CX-13, p. 33).

In January 2002 Dr. Barrett prescribed physical therapy and a strengthening program for Claimant and continued to question his ability to return to Longshore work. (CX-13, p. 31). In March 2002, he placed Claimant in a more vigorous lumbar strengthening program, noting Claimant's lower back was improving although he still experienced some weakness. At his deposition, Dr. Barrett testified the Med-X physical therapy program was designed to isolate the lower back muscles. However, he was not made aware that Claimant was unable to complete the therapy program. (EX-7, pp. 16-20). In April 2002, Dr. Barrett continued to keep Claimant off of any work duty, indicating work would be counterproductive to his physical therapy. (CX-13, p. 24).

In June 2002, Claimant presented to Dr. Barrett with an onset of significant sciatic pain, although no objective evidence of such pain was revealed in x-rays and films taken. Myelogram and post-myelogram CT scans taken in early August 2002 showed no lesions within the surgical area and no pressure on the S1 nerve root. Dr. Barrett testified he did not have any objective explanation for Claimant's pain; although, he indicated it could have been a vascular problem or scar tissue in and around the nerve root which can be difficult to diagnose. Dr. Barrett kept Claimant off of work. (CX-13, p. 19; EX-7, pp. 25-26). On September 5, 2002, Dr. Barrett suggested the need for a functional capacity evaluation (FCE) before assigning maximum medical improvement. (CX-13, p. 18).

Dr. Barrett testified Claimant showed no improvement by December 2002, and was unable to perform the ordered FCE secondary to his high blood pressure. On December 19, 2002, Dr. Barrett released Claimant to light duty work with a 30-pound lifting restriction, standing or sitting for one hour at a time with five minutes rest. He testified he probably told Claimant about the restrictions shortly after writing the note, but had no independent recollection of giving Claimant a return to work slip. (CX-13, p. 17; EX-7, pp. 29-32, 36-38). Dr. Barrett did not note any improvement in January 2003, and testified he placed Claimant back on temporary total disability (TTD) awaiting additional testing and an FCE. A repeat myelogram performed on March 3, 2003, showed bone overgrowth which could have irritated the S1 root, as well as moderate stenosis above the fusion. Dr. Barrett testified Claimant did not want further

exploratory surgery. They discussed conservative treatment by way of injections; he added Claimant's pain was very specific, definite and continuing. He released Claimant back to light duty, under the same restrictions outlined in December 2002. (CX-13, pp. 12-14; EX-7, pp. 41-45).

In April 2003, Claimant presented to Dr. Barrett with different symptomatology of pain in and around his quadriceps and above his right knee; this was consistent with the stenosis findings and Dr. Barrett encouraged him to proceed with steroid injections. Dr. Barrett testified he placed Claimant back on TTD and restricted him from working out of concern for the new and different symptoms. He testified Claimant's pain was corroborated by objective findings of bulging discs and nerve root narrowing at L3-4. He clarified the bulging disc was probably a direct result of the surgery and worsened the stenosis, which most likely pre-dated the accident. (CX-13, p. 9; EX-7, pp. 46-50). By June 10, 2003, Claimant was not getting much relief from the injections and Dr. Barrett advised him to try doing 4-8 hours of housework within the sedentary work restrictions of lifting no more than 10 pounds, standing no more than one hour. He testified he did not release Claimant to full time work, but wanted to try and get him back in the work mode. (CX-13, p. 6; EX-7, p. 55).

Claimant presented to Dr. Barrett on October 9, 2003, with continued back and right leg pain, but indicated he felt better than he did before the surgery. Dr. Barrett testified that at this time, it was becoming very unlikely that Claimant would be able to return to Longshore work. He reviewed Dr. Blake's records, and agreed with him that Claimant was probably capable of sedentary work levels, at most. Dr. Barrett testified Claimant's ongoing chronic pain may severely limit his ability to work an eight-hour day at any physical demand level. He added that Claimant's Lorcet and hydrocodone medications would limit his ability to drive; however, he only takes these medications as needed, not on a regular basis. (CX-13, p. 3; EX-7, pp. 57-58, 84). On March 16, 2004, Dr. Barrett noted Claimant was doing well, but would not be able to return to his usual duties at Employer. He testified Claimant was permanently restricted to sedentary duties as of this date; specifically Claimant would not be able to stoop, bend or climb, but he could occasionally stand. Of the job descriptions compiled by Ms. Favaloro and presented to Dr. Barrett at his deposition, he only refused to authorize the unarmed security guard position, but approved the other four positions of production worker, assistant teacher, dispatcher and admissions clerk. Although

Claimant's complaints of pain were subjective, Dr. Barrett testified they were consistent and he did not have any reason to disbelieve them. Overall, he found Claimant to be straightforward, honest and sincere. (EX-7, pp. 65-67, 71, 83).

On June 22, 2004, Dr. Barrett noted Claimant suffered emotional problems stemming from his separation from his wife as well as significant depression secondary to his inability to work. Dr. Barrett recommended Claimant receive a psychological evaluation to determine the need, if any, for further psychological treatment. (CX-13, p. 1; EX-7, p. 74).

Dr. Kendall Blake

Dr. Blake evaluated Claimant on September 8, 2003, at Employer's request. Claimant presented with complaints of specific right S1 nerve root syndrome which was not made better by epidural steroid injections. Physical examination revealed Claimant had full range of motion in the lumbar spine, except for a loss of excursion of the lumbar-sacral region. (CX-12, p. 1).

Dr. Blake indicated there was objective evidence of Claimant's continuing S1 nerve root dysfunction. He noted Claimant was most likely at MMI given the history of his injury, and would not see a lessening of his symptoms. Although Claimant's x-rays indicated he had significant degenerative disc disease at the time of his injury, his ongoing symptoms were the result of his described injury on September 3, 2000. Dr. Blake recommended Claimant return to sedentary work with no standing, climbing, stooping, bending or lifting. (CX-12, p. 2).

When presented with the descriptions of the jobs identified in Ms. Favaloro's labor market survey, Dr. Blake did not approve the assistant teacher, manager trainee or unarmed security guard positions. He did, however, approve the production worker, dispatcher and admissions clerk positions. (EX-10, pp. 1-2).

Dr. Jeffrey Laseter

Claimant first presented to Dr. Laseter for pain management on April 22, 2003, with low back pain radiating to both legs. Dr. Laseter noted Claimant was two years post-op from his anterior/posterior fusion at L4-S1, with degenerative and post-operative changes and stenosis above the fusion site. He indicated Claimant's pain was consistent with L3-4 stenosis. At this first visit he gave Claimant an epidural steroid injection

at L4. (CX-11, pp. 10-12). Claimant returned to Dr. Laseter on May 9, 2003, with returned pain in his lower back; Dr. Laseter gave him a second injection at L4. Id. at 5-7. On May 29, 2003, Dr. Laseter noted Claimant suffered very mild pain since the second shot, which he described as mostly burning pain in his lower leg. Dr. Laseter diagnosed Claimant with right lower extremity radicular pain. Id. at 3.

Dr. Laseter last treated Claimant on June 27, 2003, for low back pain radiating into both of his lower legs. Claimant returned with pain and weakness in his legs, despite having had two epidural steroid injections. Dr. Laseter noted Claimant developed weakness with dorsiflexion and expressed concern about a possible problem at L5. Dr. Laseter indicated he would look into getting an updated MRI scan. (CX-11, p. 1).

Edward Manning, Ph.D.

Dr. Manning performed a neuropsychological evaluation of Claimant on August 30, 2004. Claimant provided a description of his 2000 accident and injury to Dr. Manning, as well as his surgery in 2001 and subsequent treatments consistent with his testimony at hearing and the totality of the record. Claimant indicated his recovery was initially good, but eventually things began to go backwards. At this evaluation, Claimant complained of sharp pain radiating to his right leg and foot, dull pain in his lower back as well as tingling and numbness in his back. However, Claimant also informed Dr. Manning his physical condition and the quality of his life are currently much better than they were before the surgery. (CX-21, p. 1).

Claimant informed Dr. Manning that his pain, inability to work and subsequent financial difficulties resulted in a strain on his marriage and have combined to present a significant challenge to him. Claimant expressed hopelessness and doubt in his ability to work through his situation, describing episodic sadness, depression, and decreased self-efficacy. While he currently lives with his wife, she has left him on occasion. Claimant relayed uncertainty about his future; he was resigned to the fact he will have ongoing pain and did not feel able to return to his job as a roustabout, but he did not know what else he might be able to do. Dr. Manning noted Claimant expressed the need to be productive. (CX-21, pp. 1-2).

Upon examination, Dr. Manning found Claimant to be alert, responsive and cooperative. He was well-oriented and even talkative. Claimant indicated his sleep varied secondary to his

pain, and his appetite was good. (CX-21, p. 2). MMPI-II testing results reflected a significant amount of psychological distress. Claimant's responses indicated to Dr. Manning he felt overwhelmed by the situation and may be likely to experience physical symptoms secondary to his stress and psychological strain. Dr. Manning clarified he did not find Claimant to be malingering or manufacturing or magnifying his symptoms, but may experience an increase in somatic complaints and psychological distress when faced with stresses or demands. Id. at 3-4.

Dr. Manning recommended psychological intervention to address Claimant's depression and pain management. Specifically, he advised six to eight follow-up visits be scheduled to implement a cognitive behavioral therapy program, at which time a follow-up assessment would be performed. Dr. Manning did not comment on Claimant's ability or inability to perform work secondary to his psychological problems. (CX-21, p. 4).

Contentions of the Parties

Claimant contends he has not yet reached maximum medical improvement, as he is still under the active medical care of Dr. Barrett and has been referred for psychological treatment. Claimant also requested, in a Motion In Limine, that Mr. Hegwood's records be excluded on the basis he conducted **ex parte** communications with Claimant, and that Ms. Favaloro's records be excluded to the extent they rely on those of Mr. Hegwood. Further, Claimant argues the vocational experts failed to consider the medical evidence indicating he is unable to work, thus the labor market surveys do not comply with Turner, and he is entitled to continued total disability benefits. Claimant also argues his average weekly wage should be calculated under Section 10(c) of the Act, not in accordance with his daily wage records. Including his regular pay, overtime pay, incentives, longevity, safety, school and travel time, Claimant asserts his average weekly wage should be $1,389.44, not $746.54. Finally, Claimant contends penalties are due secondary to Employer's untimely notice of controversion; that he is entitled to interest as a matter of law; and his PTD should be adjusted.

Employer contends Claimant's Motion In Lmine should be denied on the basis that Mr. Hegwood had no actual or constructive knowledge Claimant was represented by counsel. Further, Employer argues Claimant should be placed at permanent partial disability no later than October 31, 2003, when his benefits were reduced to PPD. Employer argues the medical and

vocational records in evidence fully support a finding of MMI and the establishment of suitable alternative employment at least as of this date. Despite Dr. Manning's recommendation of psychological treatment, Employer contends this does not prevent Claimant from returning to work. Finally, Employer contends Claimant's average weekly wage was accurately calculated under Section 10(c) and that based on his total earnings paid for each "Pay period" his rate of compensation should be to be $497.69. Specifically, Employer argues the total earnings indicated for each pay period include his regular wages, overtime wages and various bonuses and extra pay; to follow Claimant's suggestion would be to count these wages twice.

IV. DISCUSSION

A. Claimant's Motion in Limine

Prior to the hearing, Claimant filed a Motion In Limine requesting the vocational records of Mr. Hegwood and Ms. Favaloro be excluded from evidence on the basis that Mr. Hegwood engaged in communication with Claimant outside the presence of his attorney. Employer opposed the pre-hearing motion, which was denied by the undersigned, citing crucial facts were raised and disputed thus requiring factual development and an evidentiary hearing. (See Order Denying Motion in Limine, August 3, 2004).

Upon reviewing the entirety of the record and taking into consideration the testimony at the hearing, I find no basis on which to grant Claimant's motion. Claimant signed a letter of representation on June 26, 2001. Mr. Benfield and Mr. Hegwood both engaged in direct and indirect communication with Claimant between June 26, 2001 and February 2002. Mr. Benfield testified he did not receive a copy of Claimant's letter of representation until March 22, 2002. Moreover, he asked Claimant on multiple occasions if he had an attorney and Claimant replied "no" each time. Mr. Hegwood also testified he asked Claimant if he had an attorney, and Claimant did not inform him of his representation until February 2002. Furthermore, Claimant testified he was unaware he had an attorney during his November 2001 meeting with Mr. Hegwood; sometime after the meeting his wife corrected him and he so informed Mr. Hegwood. Claimant also testified he did not recall informing Mr. Benfield he had an attorney. The evidence thus supports Employer's position that Mr. Benfield and Mr. Hegwood did not have knowledge Claimant was represented by counsel, thus they could not have knowingly engaged in **ex parte** communications. Indeed, Claimant himself did not have knowledge

of such representation until his wife subsequently informed him. Claimant's motion is therefore **DENIED**.

B. Nature and Extent of Disability

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as the "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, supra, at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22

BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

(1) Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, n. 5 (1985); Trask v. Lockheed Shipbuilding Construction Co., supra; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981). An employee is considered permanently disabled if he has any residual disability after reaching MMI. Lozada v. General Dynamics Corp., 903 F.2d 168 (2d Cir. 1990); Sinclair v. United Food & Commercial Workers, 13 BRBS 148 (1989); Trask v. Lockheed Shipbuilding & Construction Co., supra. A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition. Leech v. Service Engineering Co., 15 BRBS 18 (1982). The Board has also held, in dicta, that maximum medical improvement can be established even when further improvement is likely at some unspecified point in the future. Walsh v. Vappi Constr. Co., 13 BRBS 442, 445 (1981).

In the present case, Claimant's treating physician, Dr. Barrett, did not testify or note a specific date on which Claimant reached maximum medical improvement. A review of his medical records indicates Claimant's physical condition arguably did not stabilize until June 2003. Specifically, although his recovery progressed well in the months following his April 2001 surgery, Dr. Barrett noted Claimant experienced pain and numbness in November 2001. Throughout the first half of 2002 Dr. Barrett prescribed physical therapy for Claimant with the hope of improving his pain and physical abilities. In June 2002, Claimant presented with an onset of significant sciatic pain. Through the rest of 2002 Claimant's condition did improve, although his high blood pressure prevented him from performing an FCE.

In January 2003, Dr. Barrett ordered additional testing, which revealed bone overgrowth and moderate stenosis at the site of the fusion in his lumbar spine. In April 2003, Claimant presented with different symptoms, pain and numbness in his knee and quadriceps. At this time, Dr. Barrett referred Claimant to Dr. Laseter for pain management. Dr. Laseter performed two epidural steroid injections at Claimant's L4 level, in April and May 2003. On June 10, 2003, Dr. Barrett noted Claimant was not receiving much relief from the injections, and still experienced low back pain radiating into his legs. Dr. Laseter noted the same on June 27, 2003, indicating he would request further testing to determine if there was a problem at the L5 level. At the June 10, 2003 evaluation, Dr. Barrett suggested Claimant start doing light housework to assess his ability to return to work. Thus, it appears Claimant's physical condition stabilized by June 27, 2003, as his symptoms were consistent and both Dr. Barrett and Dr. Laseter indicated Claimant was not receiving benefit from the treatments they provided. As Claimant did not express a willingness to undergo exploratory surgery to determine what was causing his pain, his medical treatment ceased having the objective of improving his condition. Although Dr. Laseter indicated he wanted to perform further tests to determine what was causing Claimant's pain, this does not preclude a finding of stabilization of Claimant's condition as of June 27, 2003.

Such a conclusion is supported by Dr. Blake's opinion on September 8, 2003, that Claimant had achieved maximum medical improvement as of that date, based on the history of his injury and medical treatment. Based on the foregoing medical evidence, I find Claimant achieved maximum medical improvement on June 27, 2003, his last recorded visit with Dr. Laseter. Therefore, it follows that Claimant's temporary total disability became permanent total as of June 27, 2003.

(2) Suitable Alternative Employment

To establish a **prima facie** case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994). If the claimant is successful in establishing a **prima facie** case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment. New

Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). An injured employee's total disability becomes partial on the earliest date that the employer shows suitable alternate employment to be available. Rinaldi v. General Dynamics Corporation, 25 BRBS at 131 (1991); Director, OWCP v. Bethlehem Steel Corporation (Dollins), 949 F.2d 185, 186 n. 1 (5th Cir. 1991).

In the present case, the parties agree Claimant is unable to return to his job as a roustabout at Employer. Although Dr. Barrett initially expected Claimant to be able to return to his former job, it became apparent by the fall of 2002 that he would be limited to either light or sedentary work. This is not contested by the parties. As such, Claimant has presented a **prima facie** case of total disability and the burden now shifts to Employer to establish suitable alternative employment to support a finding of partial disability.

Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

> (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
>
> (2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?

Turner, 661 F.2d at 1042. Turner does not require employers find specific jobs for a claimant; instead, the employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." P & M Crane Co. v. Hayes, 930 F.2d 424, 431 (1991); Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992).

However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and that it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988). The

administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. Villasenor v. Marine Maintenance Industries, Inc., 17 BRBS 99 (1985); See generally Bryant v. Carolina Shipping Co., Inc., 25 BRBS 294 (1992); Fox v. West State, Inc., 31 BRBS 118 (1997). Should the requirements of the jobs be absent, the administrative law judge will be unable to determine if claimant is physically capable of performing the identified jobs. See generally P & M Crane Co., 930 F.2d at 431; Villasenor, supra. Furthermore, a showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for **special skills** which the claimant possesses and there are few qualified workers in the local community. P & M Crane Co., 930 F.2d at 430. Conversely, a showing of one unskilled job may not satisfy Employer's burden.

In the present case, Dr. Barrett first released Claimant to work in December 2002. His opinion as to if and to what extent Claimant could work, however, fluctuated for approximately six months. The pertinent dates and restrictions assigned by Dr. Barrett are as follows:

December 19, 2002:	Released Claimant to light duty work Restrictions: 30 pounds maximum lifting; standing and sitting no more than one hour at a time
January 31, 2003:	Removed Claimant from work; at TTD awaiting further testing
March 3, 2003:	Released Claimant to light duty work Restrictions: same as in December 2002
April 22, 2003:	Removed Claimant from work secondary to new complaints of pain; at TTD
June 10, 2003:	Still at TTD; advised Claimant to perform four to eight hours of housework per day, lifting no more than 10 pounds and standing no longer than one hour
October 9, 2003:	Agreed with Dr. Blake's assessment Claimant could return to sedentary work duties. Dr. Barrett expressed doubt Claimant would be able to work 8 hours per day with his chronic pain.

March 16, 2004: Opined Claimant would be permanently restricted to sedentary work duties Restrictions: no stooping, bending or climbing; occasional standing

Thus, Dr. Barrett, Claimant's treating physician, released Claimant to sedentary work duty as of October 9, 2003. He maintained this opinion on March 16, 2004, when he opined Claimant would be permanently restricted to sedentary work within the restrictions outlined above. This was consistent with Dr. Blake's opinion on September 8, 2003, that Claimant was capable of sedentary work with no standing, climbing, stooping, bending or lifting. Despite Dr. Barrett's concern that Claimant's pain would prevent him from being able to work, I find the evidence establishes Claimant was indeed capable of sedentary work as of October 9, 2003.

Employer submitted evidence of three labor market surveys conducted in Claimant's geographic area. The first two surveys were issued by Mr. Hegwood in June and December 2002 and were based on the light physical demand level. As the surveys were conducted no earlier than 10 months prior to Claimant's release to work, and did not fit the category of sedentary physical demand to which Claimant was released by both his and Employer's doctors, I find it would be inappropriate to consider these labor market surveys to support a finding of partial disability in the present claim, since all identified jobs exceeded the sedentary level of work.

Employer commissioned a third labor market survey from Ms. Favaloro which was issued on February 3, 2004. Ms. Favaloro based her survey on Dr. Barrett and Dr. Blake's opinions that Claimant was capable of sedentary work. She consulted the medical reports of Dr. Barrett, Dr. Blake and Dr. Laseter, as well as the background information collected by Mr. Hegwood report. I find Ms. Favaloro's report shall not be discredited, as Claimant suggests, on the basis that she did not conduct a personal interview of Claimant and that she did not travel to Weir, Mississippi to personally investigate the actual availability of jobs. Employer submitted the jobs listed by Ms. Favaloro to both Dr. Barrett and Dr. Blake for their approval. The positions were assistant teacher, production worker, dispatcher, manager trainee, unarmed security guard and admissions clerk. Dr. Barrett did not approve the security guard position; Dr. Blake did not approve the assistant teacher, manager trainee or the security guard positions.

The remaining jobs which both doctors approved include production worker, dispatcher and admissions clerk. Consistent with the doctor's opinions, I find these jobs to be suitable for Claimant. Each position is performed sitting down, but allows for standing as needed. Any lifting involved is occasional and less than ten pounds; in the production worker position lifting is more frequent and less than five pounds. This is consistent with Dr. Barrett's restrictions of sedentary activity. Although Dr. Blake's restrictions included no standing and no lifting, presumably precluding these jobs, he specifically approved the three positions described. I therefore find the positions of production worker, dispatch and admissions clerk are within Claimant's physical abilities and the restrictions assigned by his doctors.

Notwithstanding Claimant's complaints of pain, I am not persuaded by Claimant's testimony that he is only able to perform part-time work. While Dr. Barrett indicated this pain might prevent Claimant from working full-time, he did not limit Claimant's release to work on this basis. Moreover, I find the jobs are within Claimant's transferable skills and training abilities. As such, I conclude the positions of production worker, dispatch and admissions clerk satisfy Employer's burden of establishing suitable alternative employment. Thus, Claimant's disability became partial as of February 3, 2004, the date of Ms. Favaloro's labor market survey.[7]

C. Residual Wage Earning Capacity

When an employer presents several different jobs that are available to a claimant, or when a claimant has worked several different jobs, it is appropriate to average the earnings to arrive at a fair and reasonable estimate of the claimant's earning potential. Avondale Industries, Inc. v. Pulliam, 137 F. 3d 326, 328 (5th Cir. 1998)(finding that averaging several jobs offered by an employer was appropriate because the court has no way of determining which job the claimant will obtain and the average wage reflects all those jobs that are available); Shell Offshore Inc. v. Cafiero, 122 F.2d 312, 318 (5th Cir. 1997) (holding that averaging was a reasonable method to calculate a claimant's post-injury earning capacity); Louisiana Insurance Guaranty. Ass'n v. Abbott, 40 F.3d 122, 129 (5th Cir.1994)

[7] I find Claimant's disability is partial as of the date of the survey, despite the fact his doctors did not approve the jobs until after the hearing. (EX-7; EX-10).

(finding that averaging salary figures to establish earning capacity was appropriate and reasonable).

In the present case, three jobs were found to establish suitable alternative employment for Claimant. Based on the wages indicated in Ms. Favaloro's labor market survey, the jobs pay hourly wages of $6.25, $6.50 and $6.50 for an average of $6.42 per hour, or $256.67 per 40-hour work week. Thus, I find Claimant has a residual wage-earning capacity of $256.67 per week as of February 3, 2004.

D. Average Weekly Wage

Section 10 of the Act establishes three alternative methods for determining a claimant's average annual earning capacity, 33 U.S.C. § 910(a)-(c), which is then divided by 52 to arrive at the average weekly wage. 33 U.S.C. § 910(d)(1); Staftex Staffing v. Director, OWCP, 237 F.3d 404, 407 (5th Cir. 2000), on reh'g 237 F.2d 409 (5th Cir. 2000); 33 U.S.C. § 910(d)(1). When neither Section 10(a) nor Section 10(b) can be "reasonably and fairly applied" Section 10(c) is an applicable catch-all provision for determining a claimant's earning capacity. 33 U.S.C. § 910(c) (2002); Louisiana Insurance Guaranty Assoc. v. Bunol, 211 F.3d 294, 297 (5th Cir. 2000); Wilson v. Norfolk & Western Railroad Co., 32 BRBS 57, 64 (1998). For traumatic injury cases, the appropriate time for determining an injured worker's average weekly wage is the time in which the event occurred that caused the injury and not the time that the injury manifested itself. Leblanc v. Cooper/T. Smith Stevedoring, Inc., 130 F.3d 157, 161 (5th Cir. 1997); Deewert v. Stevedoring Services of America, 272 F.3d 1241, 1246 (9th Cir. 2001) (finding no support for the proposition that the time of the injury is when an employee stops working); McKnight v. Carolina Shipping Co., 32 BRBS 165, 172 (1998).

The judge has broad discretion in determining the annual earning capacity under Section 10(c). James J. Flanagan Stevedores, Inc. v. Gallagher, 219 F.3d 426 (5th Cir. 2000)(finding actions of the ALJ in the context of Section 10(c) harmless in light of the discretion afforded to the ALJ). The prime objective of Section 10(c) is to "arrive at a sum that reasonably represents a claimant's annual earning capacity at the time of injury." Empire United Stevedores v. Gatlin, 936 F.2d 819, 823 (5th Cir. 1991); Cummins v. Todd Shipyards, 12 BRBS 283, 285 (1980). The purpose of calculating a claimant's average weekly wage is to determine his earning capacity at the time of his injury. That is, the amount of earnings that a claimant

would have had the potential and opportunity to earn absent the injury. Jackson v. Potomac Temporaries, Inc., 12 BRBS 410, 413 (1980).

In the present case, the parties reached a post-hearing agreement that Claimant's average weekly wage at the time of his injury was $746.54. The parties' agreement is accepted as a stipulation of fact since it is supported by the record evidence.

E. Entitlement to Disability Benefits

Based on the foregoing discussion, I find Claimant was temporarily totally disabled from the date of his injury through June 27, 2003, the date he reached maximum medical improvement. He is thus entitled to 2/3 of his average weekly wage, $746.54, or $497.69 per week in temporary total disability benefits. 33 U.S.C. § 908(b). On June 27, 2003, Claimant's condition became permanent in nature, thus he is entitled to $497.69 per week in permanent total disability benefits from that date until February 3, 2004, when Employer established suitable alternative employment. 33 U.S.C. § 908(a). Based on the suitable alternative employment submitted by Employer, I find Claimant has a post-injury wage earning capacity of $256.67 per week. He is thus entitled to permanent partial disability benefits in an amount equal to 2/3 of the difference between his average weekly wage and post-injury wage earning capacity, or $326.55 from February 3, 2004 and continuing (746.54 - 256.67 = 489.87 x .6666 = 326.55). 33 U.S.C. § 908(c)(21).

F. Entitlement to Medical Care and Benefits

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a).

The Employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the Employer, the expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care

must also be recognized by the medical profession as appropriate for the care or treatment of the claimant's injury. 20 C.F.R. §§ 702.401-402; Colburn v. General Dynamics Corp., 21 BRBS 219, 222 (1988). The employer bears the burden of showing by substantial evidence that the proposed treatment is neither reasonable nor necessary. Salusky v. Army Air Force Exchange Service, 3 BRBS 22, 26 (1975)(any question about the reasonableness or necessity of medical treatment must be raised by the complaining party before the ALJ).

A claimant has established a **prima facie** case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

Section 7 does not require that an injury be economically disabling for a claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187. Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American National Red Cross, 23 BRBS 408, 414 (1990).

In the present case, Claimant initially raised as an issue his entitlement to receive psychological treatment for his depression he suffers as a result of his pain, inability to work and subsequent financial and marital stresses. On June 22, 2004, Dr. Barrett recommended Claimant undergo a psychological evaluation. Mr. Benfield testified this request was approved by Employer in late July 2004. At the hearing, Employer did not contest this medical benefit, asserting it was waiting for Dr. Barrett to recommend a psychologist or psychiatrist to perform the evaluation. The record was left open for Claimant to be so evaluated. On August 30, 2004, Dr. Manning performed a psychological evaluation of Claimant, concluding he suffered overwhelming stress as a result of his pain and inability to work. Dr. Manning recommended psychological intervention in the form of six to eight sessions for cognitive behavioral therapy, after which Claimant's condition would be re-assessed. I find this is reasonable medical treatment; indeed, Employer did not contest Dr. Manning's recommendations in its Post-Hearing brief. As such, Claimant is entitled to medical care for his psychological condition.

Employer has paid all other medical bills and has not disputed the reasonableness of Claimant's treatment. I find Claimant is thus entitled to continued reasonable and necessary medical benefits for treatment arising from his physical and psychological injuries pursuant to Section 7 of the Act.

V. PENALTIES

Section 14(e) of the Act provides:

> If any installment of compensation payable without an award is not paid within fourteen days after it becomes due, as provided in subsection (b) of this section, there shall be added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice is filed under subsection (d) of this section, or unless such nonpayment is excused by the deputy commissioner after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

33 U.S.C. § 914(e). See also National Steel & Shipbuilding Co. v. Bonner, 600 F. 2d 1288, 1294 (9th Cir. 1997); Garner v. Olin Corp., 11 BRBS 502 (1979).

Assessment of a Section 14(e) penalty ceases whenever the employer files its notice of Controversion or pays compensation. Oho v. Castle and Cooke Terminals, Ltd., 9 BRBS 989 (1979) (Miller dissenting); Scott v. Tug Mate, Inc., 22 BRBS 164, 169 (1989). Even when the employer voluntarily pays compensation, the Section 14(e) penalty is applicable to the difference between the amount voluntarily paid and the amount determined to be due. Alston v. United Brands Co., 5 BRBS 600 (1977). An employer, however, is not required to file a notice of controversion until a dispute arises over the amount of compensation due. McKee v. D.E. Foster Co., 14 BRBS 513 (1981). When an employer files a notice of Controversion and an additional controversy subsequently develops for which the employer suspends payments, the employer should file an additional notice of controversion. See Harrison v. Todd Pacific Shipyards, 21 BRBS 399 (1998) (an employer is relieved of filing a second notice of Controversion after the informal hearing).

Claimant contends he is entitled to Section 14 penalties, but he has not established a basis for such an award. The records show Claimant last worked on September 28, 2000 and began receiving temporary total disability on October 16, 2000. Employer filed a LS-206 on October 25, 2000, noticing such voluntary payment without award. (CX-4, p. 3). Claimant received these voluntary TTD benefits through January 15, 2003, when Employer reduced his benefits to permanent partial disability compensation based on Dr. Barrett's opinion that Claimant could perform light duty work as of December 19, 2002. On January 17, 2003, Employer filed a LS-208 noticing last payment of compensation, a LS-207 controverting Claimant's entitlement to TTD benefits and a LS-206 noticing voluntary payment of PPD benefits. (CX-4; CX-5; CX-6). In November 2003, based on Dr. Barrett's vacillating opinions regarding Claimant's ability to work and Dr. Blake's September 2003 opinion that Claimant could only perform sedentary work, Employer voluntarily paid Claimant retroactive TTD benefits from January 16, 2003 through October 30, 2003. Employer subsequently filed its LS-206, LS-207 and LS-208 on November 17, 2003. (CX-4; CX-5; CX-6).

Thus, a review of the record indicates Employer timely paid compensation or filed a Notice of Controversion throughout the administration of this claim. Claimant has not offered any evidence or argument to establish the exhibits do not accurately reflect the dates Claimant received his benefits. Thus, he was voluntarily paid TTD through January 15, 2003 and controversion was filed a mere two days later. This is clearly within the time limits allowed. Eleven months later, Employer re-assessed the claim and voluntarily paid TTD on a retro-basis through October 30, 2003, even though it was not required to do so. It then filed its controversion on November 17, 2003, which I find to be timely. As such, Claimant has not established a basis for awarding penalties in this case and his request is hereby denied.

VI. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent

part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . ." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984).

Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director.

VII. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VIII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer shall pay Claimant compensation for temporary total disability from September 3, 2000 through June 27, 2003, based on Claimant's average weekly wage of $746.54 and a corresponding compensation rate of $497.69, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer shall pay Claimant compensation for permanent total disability from June 28, 2003 through February 2, 2004, based on Claimant's average weekly wage of $746.54 and a corresponding compensation rate of $497.69, in accordance with the provisions of Section 8(a) of the Act. 33 U.S.C. § 908(a).

3. Employer shall pay Claimant compensation for permanent partial disability from February 3, 2004 through the present and continuing based on two-thirds of the difference between Claimant's average weekly wage of $746.54 and his reduced weekly earning capacity of $256.67, for a corresponding weekly compensation rate of $326.55, in accordance with the provisions of Section 8(c) of the Act. 33 U.S.C. § 908(c)(21).

4. Employer shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's September 3, 2000 work injury, pursuant to the provisions of Section 7 of the Act, including psychological treatment.

5. Employer shall receive credit for all compensation heretofore paid, as and when paid.

6. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

7. Claimant's attorney shall have thirty (30) days from the date of service of this decision by the District Director to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days from date of service to file any objections thereto.

ORDERED this 25th day of January, 2005, at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge